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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Thomas C. Hendrix, Regional Director
Region 17

DATE: May 31, 1983

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

Weingarten Chron
506-4033-3000
512-5072-2400

SUBJECT: Yellow Freight System, Inc.
Case 17-CA-11531

This case was submitted for advice on the issue of whether the Employer violated the Act, under Weingarten 1/ principles, when it denied Union representation to an employee prior to the administration of a sobriety test.

It was concluded that the charge should be dismissed, absent withdrawal.

In a prior case, Advice concluded that an employee is entitled to a representative prior to taking such a test. See Red Star Express Lines of Auburn, Inc., Case 1-CA-19,406 Advice Memorandum of August 20, 1982; Whitlock, Inc., Case 7-CA-18773, Advice Memorandum dated May 6, 1981. In the instant case, the employee did not specify as to when [redacted] desired the presence of a representative, but [redacted] request was broad enough to encompass the presence of a representative prior to going to the hospital for such a test. Thus, [redacted] request, to that extent, was a valid Weingarten request. 2/ The employee, however, said that [redacted] wanted a Union representative, i.e., no one else would satisfy [redacted] request. The Region found that, in response to the employee's request, the Employer made a good faith effort to find a Union representative, but none was available. Given the need to administer the sobriety test promptly, the Employer had a legitimate interest in proceeding without a Union representative. 3/ Consequently, the Employer was privileged to deny the employee's request for a Union representative at the plant prior to the

1/ N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1975).


2/ It was concluded that the contract in this case does not contain a waiver of the employee's Weingarten rights since the contract contains no language regarding representation prior to the test.

3/ Coca-Cola Bottling Co. of Los Angeles, 227 NLRB 1276; Red Star Express Lines of Auburn, Inc., Case 1-CA-19,406 Advice Memorandum of August 20, 1982.

administration of the sobriety test.

The employee's request was also broad enough to encompass a request for a representative at the hospital prior to the test and a representative during the actual administration of the test. 4/ Assuming arguendo, that the employee had a Weingarten right to such representation, it is clear that the Coca Cola rationale applied supra would also apply to these requests as well.

Accordingly, the Region should dismiss the charge, absent withdrawal.


H.J.D.

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4/ In Whitlock, Advice concluded that there was no Weingarten right to a representative during the administration of a urinalysis test. In the instant case, the facts are unclear as to what kind of sobriety test the Employer desired. It is also conceivable that the hospital would decide on the kind of sobriety test to be given. If so, it could be argued that there is a need for Weingarten representative at the hospital prior to the administration of any test. Finally, assuming arguendo, that a breathalyzer test was contemplated, the issue of a possible change in past practice is not presented, for there is no 8(a)(5) charge.